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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8 UNITED STATES OF AMERICA,

9 Plaintiff

10 v.

11 NORBERTO FLORES-LOPEZ,

12 Defendant.  
13

CASE NO. CR19-203RSM

ORDER GRANTING APPEAL OF  
MAGISTRATE JUDGE'S  
RELEASE ORDER

14 This matter comes before the Court on the United States' Appeal of Magistrate Judge's  
15 Release Order. Dkt #254. On April 3, 2020, Magistrate Judge Theiler found that the recent  
16 COVID-19 pandemic was a changed circumstance sufficient to allow Defendant to reopen the  
17 issue of detention and that release was warranted given a mitigated risk of flight due to the  
18 COVID-19 pandemic. The Government now appeals that Order, arguing that the first finding  
19 was in error because "(1) there have been no confirmed cases of the COVID-19 virus at the  
20 Federal Detention Center (FDC), (2) the FDC has undertaken substantial safety measures to  
21 prevent the introduction of the virus at the institution, and (3) Defendant is a healthy 22-year old  
22 male, who does not suffer from any underlying medical conditions that would make him  
23 particularly vulnerable or otherwise part of a high-risk group." *Id.* at 2. The Government  
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1 maintains that the second finding was in error because Defendant's flight risk has not changed.  
2 *Id.* at 21.

3 The Government provides an extensive background of the underlying case and procedural  
4 history, which the Court need not recite as it is well known to the parties and the Court is only  
5 examining limited issues. *Id.* at 3–18. Defendant was ordered detained by Magistrate Judge  
6 McCandlis after the initial detention hearing. Dkt. #133. On March 23, 2020, Defendant filed a  
7 Motion to Revise Detention Order seeking his release. Dkt. #238. The only change in  
8 circumstance cited in his motion was the recent COVID-19 pandemic and a general concern  
9 regarding Defendant's health if the virus comes to the Federal Detention Center ("FDC"). *Id.*  
10 Defendant later filed an emergency motion seeking the same release based on COVID-19 and  
11 mentioned an inability to communicate with counsel at the FDC. On April 3, 2020, Magistrate  
12 Judge Theiler conducted a hearing on the matter and granted the Motion. This appeal followed.  
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14 An appeal of a magistrate's detention order is governed by 18 U.S.C. § 3145(a)(1), which  
15 provides that "if a person is ordered released by a magistrate judge (1) the attorney for the  
16 Government may file, with the court having original jurisdiction over the offense, a motion for  
17 revocation of the order or amendment of the conditions of release." The District Court judge  
18 with original jurisdiction then reviews de novo the Magistrate Judge's detention order. *See*  
19 *United States v. Koenig*, 912 F.2d 1990, 1192 (9th Cir. 1990). In ruling on a motion for pretrial  
20 detention, the Court must make the same determination as the Magistrate Judge; whether any  
21 condition or combination of conditions will reasonably assure the appearance of the defendant  
22 as required, and the safety of any other person and the community. 18 U.S.C. § 3142(f). The  
23 United States typically bears the burden of showing that defendant poses a danger to the  
24 community by clear and convincing evidence, and it bears the burden of showing that a defendant  
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1 poses a flight risk by a preponderance of the evidence. *United States v. Gebro*, 948 F.2d 1118,  
2 1120 (9th Cir. 1991). However, the Bail Reform Act expressly provides that:

3 [s]ubject to rebuttal by the person, it shall be presumed that no  
4 condition or combination of conditions will reasonably assure the  
5 appearance of the person as required and the safety of the  
6 community if the judicial officer finds that there is probable cause  
7 to believe that the person committed an offense for which a  
8 maximum term of imprisonment of ten years or more is prescribed  
9 in the Controlled Substances Act (21 U.S.C. 801 et seq.) . . . or an  
10 offense under section 924(c) . . . of title 18 of the United States Code  
11 . . .

12 18 U.S.C. § 3142(e).

13 As an initial matter, the Court agrees with the Government that the current COVID-19  
14 pandemic alone was not a valid basis to reopen the issue of detention. A detention order may be  
15 reopened “at any time before trial if the judicial officer finds that information exists that was not  
16 known to the movant at the time of the hearing and that has a material bearing on the issue  
17 whether there are conditions of release that will reasonably assure the appearance of such person  
18 as required and the safety of any other person and the community.” 18 U.S.C. § 3142(f).  
19 Defendant’s basis to reopen detention relied on speculation as to the risk he faces of contracting  
20 the disease at the FDC and speculation as to the impact such would have on his health. Both  
21 sides speculate as to whether the current COVID-19 shutdown conditions outside the FDC would  
22 increase or decrease Defendant’s flight risk. The Court finds that Defendants’ information was  
23 too speculative and generalized to have a material bearing.

24 There is a presumption of detention in this case because Defendant is facing a ten-year  
25 mandatory minimum term of imprisonment. Even if Defendants’ new COVID-19 information  
26 was not speculative, the Court finds that Defendant’s age and lack of any underlying medical  
27 conditions would not make him particularly vulnerable or otherwise part of a high-risk group.

1 This is a significant point. Although the parties can debate whether or not the new coronavirus  
2 is or will be spreading at the FDC, the Court is not convinced that this constitutes a significant  
3 enough risk to this Defendant's health to warrant release given the initial bases for Judge  
4 McCandlis to order detention.

5 Defendant argues that he is being deprived of his Sixth Amendment right to counsel given  
6 the limitations on attorney visits at the FDC. Dkt. #257 at 4. Defendant is still able to  
7 communicate with counsel via CORRLINKS email and telephone, although this access has  
8 apparently been delayed or disrupted due to the FDC's efforts at social distancing. The Court  
9 finds that, under the circumstances, this is sufficient to provide Defendant with access to counsel.  
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11 Having reviewed the briefing, along with the remainder of the record, the Court hereby  
12 finds and ORDERS that the United States' Appeal of Magistrate Judge's Release Order, Dkt  
13 #254, is GRANTED. Defendant will remain in custody pending trial in this matter.

14 DATED this 14th day of April, 2020.

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18 RICARDO S. MARTINEZ  
19 CHIEF UNITED STATES DISTRICT JUDGE  
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